No. 178.
Brf. of Smith for Def. in Error.

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Supreme Court of the United States

OCTOBER TERM, 1901.

The Fidelity and Deposit Company of Maryland,
Plaintiff in Error,

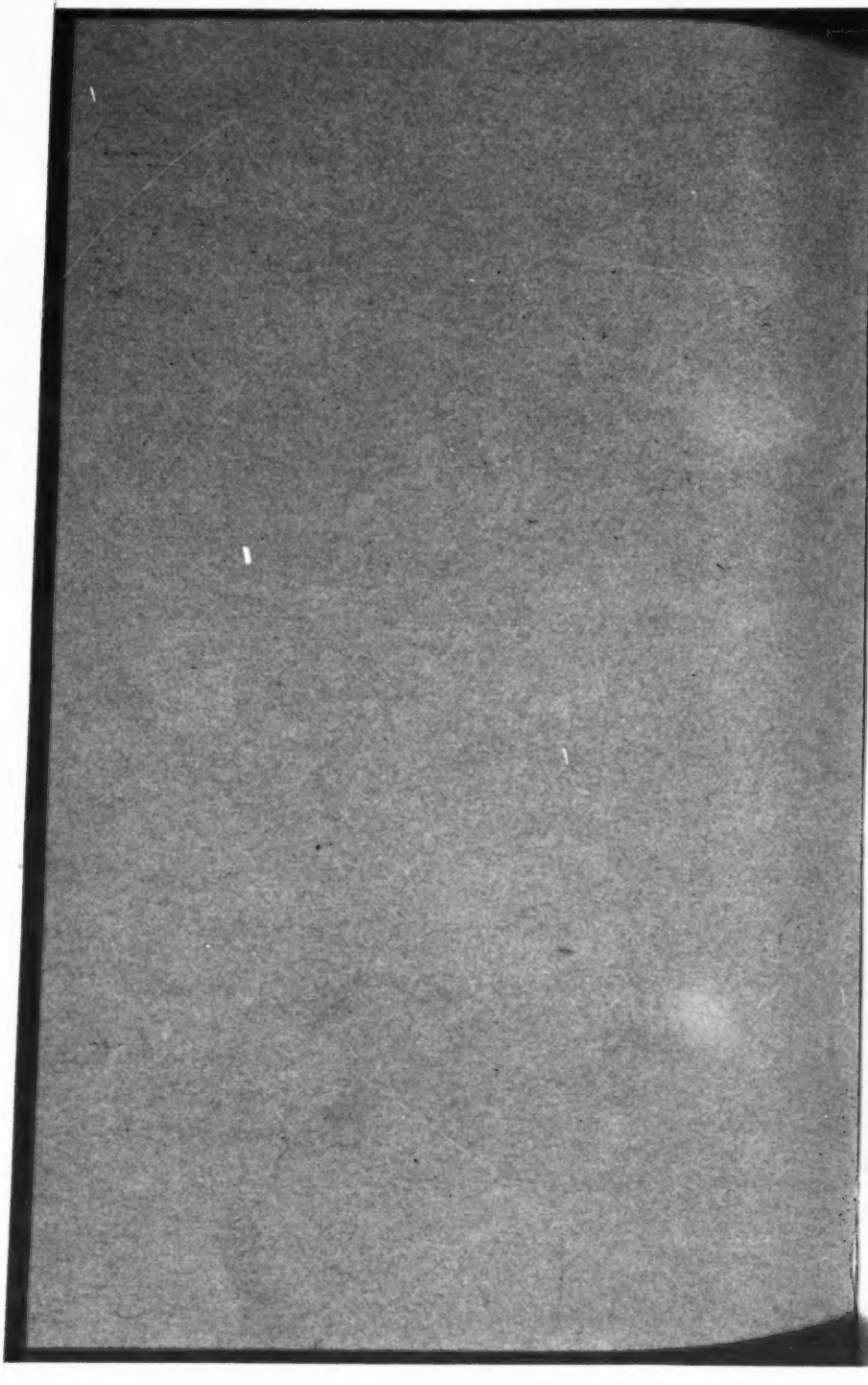
VERSUS

R. H. Courtney, Receiver of the German National Bank of Louisville, - *Defendant in Error.*

ERROR TO THE CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

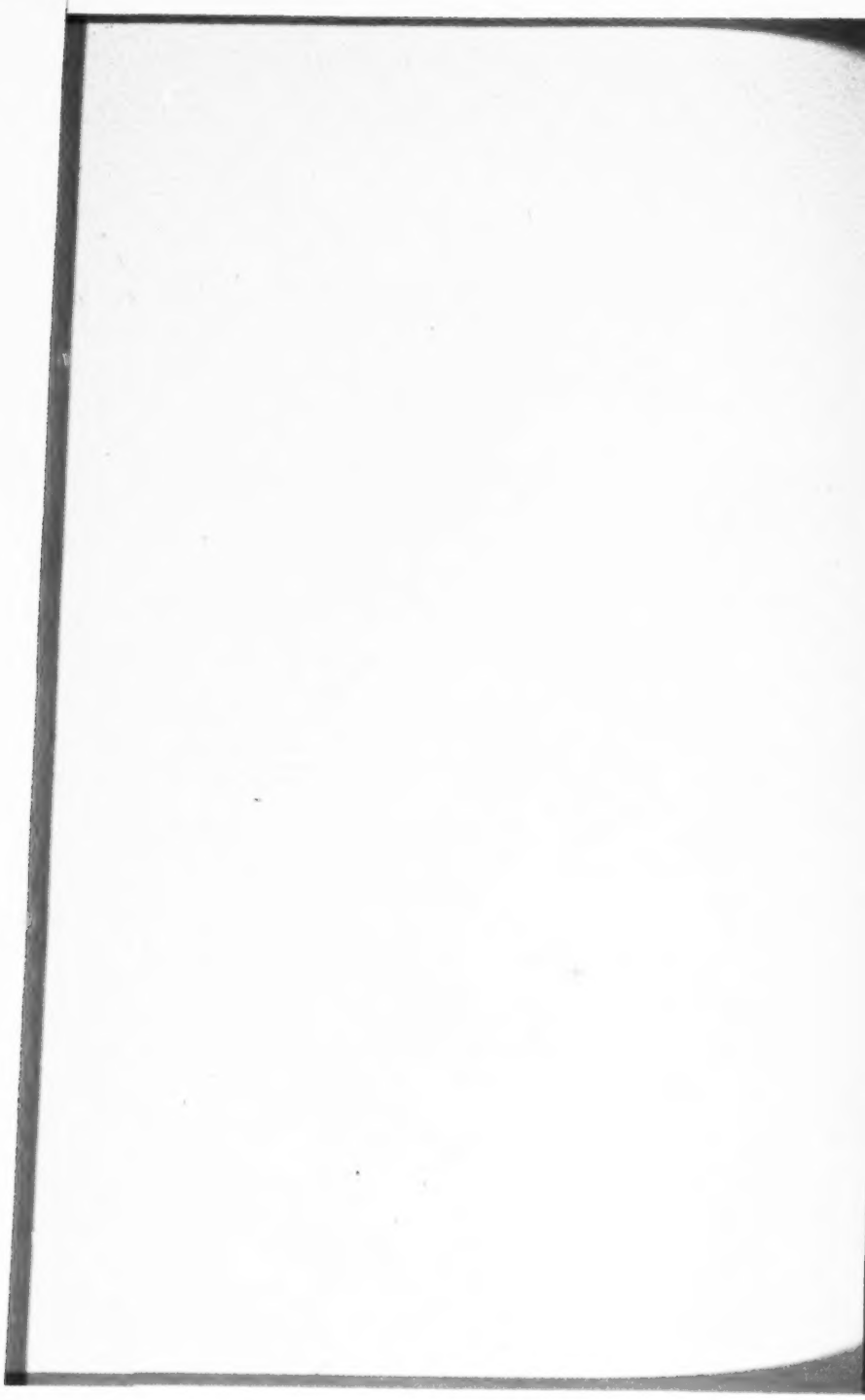
Brief for Defendant in Error.

W. M. SMITH,
Attorney for Defendant in Error.



AUTHORITIES CITED.

American Surety Company vs. Pauley, 170 U. S., 131.
American Surety Company vs. Pauley, 170 U. S., 159.
Cook on Corporations, fourth edition, Sec. 727, page 1564.
C. N. Bank vs. Clark *et al.*, 139 New York Reports, pages 312, 313 and 314.
National Bank vs. Norton, 1 Hill, 572, 578.
Bank of the United States vs. Davis, 2 Hill, 451.
United States vs. Britton, 108 U. S., 199 (702).



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Supreme Court of the United States.

THE FIDELITY AND DEPOSIT COMPANY OF MARYLAND, ... *Plaintiff in Error,*

VS.

R. H. COURTNEY, RECEIVER OF THE GERMAN NATIONAL BANK, . . *Defendant in Error.*

BRIEF FOR DEFENDANT IN ERROR.

STATEMENT.

On February the 5th, 1898, R. H. Courtney, as receiver of the German National Bank, filed this suit against the Fidelity & Deposit Company of Maryland, on a bond for $10,000, given by said Company to said Bank for the fidelity of J. M. McKnight, as President of said Bank.

On June 1, 1894, J. M. McKnight was elected Vice-President of this Bank, and executed bond for the period of one year. On June 1, 1895, he was elected *President*, and said bond was renewed by renewal receipt by plaintiff in error for the period of one year from said date, *but said renewal was for the fidelity of J. M. McKnight as President*, and was again so renewed June 1, 1896, for the period of one year. (Renewal Receipts, Record, page 6.)

The amount of loss to the Bank, charged in the petition, is $18,742.74. The items are of dates and amounts as follows:

June 11, 1894,	$252 09
January 21, 1896,	1,000 00
January 21, 1896,	1,253 00
February 6, 1896,	2,000 00
February or March, 1896,	1,650 00
June 8, 1896,	3,736 60
January 4, 1897,	379 96
April 6, 1895,	4,400 00
November 21, 1896,	2,627 94
March 19, 1895,	1,000 00
Sundry Items,	443 15
	$18,742 74

An answer and two amendments thereto were filed, also a reply to the answer and first amendment—*except the first paragraph thereof;* this paragraph was withdrawn by plaintiff in error, by agreement (see R., page 19); by said agreement defendant in error was permitted to controvert the affirmative allegations of the second amended answer of record.

A jury trial was had, which resulted in a judgment for the defendant in error for the sum of $10,000, the amount of said bond.

There are only six provisions in the bond that it is deemed necessary to consider in determining the questions submitted; they are found on page 29 of the record, and are as follows:

1. "That the Employer shall immediately give the Company notice in writing of the *discovery of any default or loss hereunder*, and shall file with the Company his or their claim hereunder, with full particulars thereof, as soon as practicable thereafter, and no claim which shall not be so filed by the Employer with the

Company within six months after the expiration or cancellation of this bond, or within six months after the Employee shall have ceased to be in the Employer's service, shall be payable hereunder."

2. "That upon notification to the Company of any loss hereunder, the Company's liability shall thereupon terminate as regards any subsequent act of the Employee."

3. "That the Employer shall observe, or cause to be observed, due and customary supervision over the Employee for the prevention of default; and if the Employer shall at any time during the currency of this bond condone any act or default on the part of the Employee which would give the Employer the right to claim hereunder, and shall continue the Employee in its service without written notification to the Company, the Company shall not be responsible hereunder for any default of the Employee which may occur subsequent to such act, or default so condoned."

4. "That there shall be a complete inspection of the accounts and books of the Employee on behalf of the Employer at least once in every twelve months from the date of this bond, such inspection to include examination of all cash and securities of which the Employee shall have custody or charge."

5. "That no suit or proceeding at law or in equity shall be brought to recover any claim under this bond unless the same shall have been commenced within twelve months (365 days) from the date of the first notification by the Employer to the Company of any loss hereunder."

6. "That the Employer shall at any time, upon the request and at the expense of the Company, afford and render all information, evidence and assistance capable of being afforded by the Employer, for the purpose of prosecuting and bringing to justice the Employee for

any criminal offense committed by him involving liability of the Company hereunder, or for the purpose of enabling the Company to procure reimbursement by the Employee, or his estate, of any sum paid by, or recoverable from the Company under this bond."

The evidence embraced in the bill of exceptions (see Record, page 39) shows that during the times the embezzlement occurred, the German National Bank carried upon its books an account known as "The Louisville Deposit Bank Account," representing collaterals held for collection and money belonging to said insolvent concern; also an account known as "E. G. Williams, Special," said Williams being a whisky broker and selling the whisky belonging to said Louisville Deposit Bank held as collateral; and also another account known as "S. E. Edmunds & Co.," said firm being composed of S. E. Edmunds and said J. M. McKnight, and being engaged in the purchase and sale of tobacco and keeping warehouse receipts pledged to the Bank as collateral.

That the amounts charged as having been embezzled grew out of transactions of said McKnight, carried on in person, and were charged by the different clerks to these above mentioned accounts, according as McKnight might direct; that McKnight was giving all these matters his special attention, and all charges that were made to said accounts were made by his directions. That S. E. Edmunds, who drew out the $1,000 charged to have been embezzled January 21, 1896, was the Edmunds of S. E. Edmunds & Co.

On page 44 of Record it shows, to-wit:

"There was also evidence tending to show that J. M. McKnight was President of the Bank, and the other officers of the Bank, including the directory, had entire confidence in his honesty and integrity up to the time the Bank was closed; that none of them had any knowledge that any act of his in the management of said Bank was fraudulent or dishonest until after the closing of the

Bank; that said Bank had a discount committee, who regularly examined and passed on the papers of the Bank, as required of such committee, and the directory of said Bank undertook to make a monthly investigation, sometimes twice a month, of the affairs of said Bank, and required the President to go through with them and make a full report thereon; that some of the directors were in the Bank almost daily inspecting its affairs, and that they did at all times observe due and customary supervision over said President for the prevention of default; that none of the officers of said Bank, including the directory, had any knowledge of the various checks set up in the petition as fraudulent, and that they were charged to the account of other parties than those drawing them, or on whom they were drawn, except the clerks who charged them up to said account as stated, and there was evidence tending to show that they charged them up to such accounts by the direction of McKnight, the President, and except, further, R. E. Reutlinger, the Cashier and Teller of said Bank, knew of said checks when they came into said Bank, and was instructed to hold them as cash items by McKnight, but further than this he had no knowledge of them."

The evidence of R. H. Courtney and James S. Escott shows that the Bank was not closed nor was McKnight arrested for the embezzlement of any of the amounts charged in the petition, but that the arrest was made on a charge of making and causing to be made a false entry as to a $10,000 cash item, and also that none of these amounts were discovered until two or three weeks after the receiver was appointed—that it was not until then that the expert accountants *began* to discover any embezzlements—and then discovered them thereafter from *time to time*. (See Record, pages 33 to 35.)

No officer of the Bank, including the directors, except President McKnight, had any knowledge of these fraudulent transactions nor could any of them have discovered them by the exercise of diligence, by reason of the peculiar nature of said accounts to which they were charged—said accounts

being both debits and credits known only to McKnight and managed by him, for whisky and tobacco sold and expenses on same, and purchase thereof.

It is contended, however, that R. E. Reutlinger, the Cashier and Teller, and Adolph Reutlinger, the Vice-President, had notice of the $1,000 check of Edmunds, and that they and also Director Reisch had notice of the $2,000 Britt and Reeder note transaction, and the errors assigned by plaintiff in error relate principally to these transactions; there are others, however, that do not—all are given here as arranged in brief by counsel for plaintiff, to-wit:

1. In admitting as a sufficient notice of McKnight's defaults the letter of R. H. Courtney, receiver, written February 18, 1897, to the Fidelity & Deposit Company.

2. In excluding from the jury the petition filed by R. H. Courtney, receiver, against McKnight, on March 6, 1897, in the Jefferson Circuit Court, to recover the amount of three of McKnight's alleged defaults and embezzlements, also set out in the petition in this case against the Fidelity & Deposit Company.

3. In instructing the jury that the claim made on the Fidelity & Deposit Company by R. H. Courtney, receiver, on July 2, 1897, was early enough in time.

4. In excluding from the jury the letter of the Cashier written on May 29, 1896, to the President of the Fidelity & Deposit Company, and stating that all moneys handled by McKnight had been accounted for, and that he had performed his duties in an acceptable and satisfactory manner, and that he knew of no reason why the guarantee bond should not be continued.

5. In telling the jury that the knowledge of Rudolph Reutlinger, the Cashier, of the alleged defaults and embezzlements of J. M. McKnight was not the knowledge of the Bank, and that the jury could not find that the Bank knew of the defaults and embezzlements of said McKnight unless we showed the Board itself had knowledge.

6. In telling the jury that the knowledge which Adolph Reutlinger, who was Vice-President and a Director, had, or which Mr. Reisch, another Director, had of the alleged

defaults and embezzlements of McKnight was not the knowledge of the Bank; and that a knowledge of said McKnight's defaults and embezzlements could not be imputed to the Bank or release the surety under its contract, unless we could prove that the Board of Directors had such knowledge.

7. In telling the jury, first in the Fifth Instruction and later in the Eighth Instruction, when they asked whether the carelessness of the Directors in the management of the Bank released the surety, that the carelessness of the Directors in the management of the Bank was not a question for their consideration, and that it would not release the surety from liability on the bond.

These errors will be considered in the same order, except Nos. I and III, which will be considered together.

I.

"Notice of McKnight's Default."

III.

"Time in Which Itemized Claims to be Filed."

The German National Bank was, by order of the Comptroller, closed January 17, 1897, and its President, J. M. McKnight, was arrested; but this action was taken not by reason of any of the defalcations herein complained of, but for certain alleged false entries and reports. On January 22, 1897, R. H. Courtney was appointed receiver, and then experts Escott and Hayes began an examination of the books that continued several months—some four or five.

R. H. Courtney says, page 34 of the record, that these defalcations were not known to him until after *he began* the examination under the experts. So the experts did not begin until *after the receiver was appointed January 22d.*

James Escott, the expert, says, page 35 of record: "*We began to get these shortages about two or three weeks after the Bank was closed—they were discovered from time to time —I began to discover them within two weeks.*"

On February 18, 1897, R. H. Courtney, as receiver, gave plaintiff in error the following notice:

J. M. McKNIGHT, President. H. H. RADEMAKER, Vice-President. R. E. REUTLINGER, Cashier.

GERMAN NATIONAL BANK.

LOUISVILLE, KY., February 18, 1897.

To the Fidelity & Deposit Company of Maryland, Baltimore, Md.:

GENTLEMEN—Referring to the certificate No. 4043, issued from your security department guaranteeing the fidelity of Jacob M. McKnight, President of the German National Bank, under your bond to him, No. 5002, issued June 1, 1894, in favor of such Bank, we hereby notify you that said Jacob M. McKnight, as President, has been found in default to this Bank, and that you will be required to make an indemnity to me as receiver to the extent of said bond.

Yours truly,

R. H. COURTNEY,

Receiver German National Bank.

Then, according to this evidence, it is conclusively shown that this notice of default was given immediately or within a day or two of the first discovery of any of these defalcations—(counsel for plaintiff in error admitted that the notice was given). (Record, page 35.)

The bond provides—

> "That the Employer shall immediately give the Company notice in writing of the discovery of any default or loss hereunder, and shall file with the Company his or their claim hereunder, with full particulars thereof, as soon as practicable thereafter, and no claim which shall not be so filed by the Employer with the Company

within six months after the expiration or cancellation of this bond or within six months after the Employee shall have ceased to be in the Employer's service, shall be payable hereunder."

There are three conditions in this provision of the bond:

1. That immediate notice shall be given of any default or loss.

This is required for the purpose of terminating any further liability, as it is further provided in said bond:

> "That upon notification to the Company of any loss hereunder the Company's liability shall thereupon terminate as regards any subsequent act of the Employee."

No statement or itemized account is required to be given under this notice, but it is further provided that *after this notice has been given*—

2. That the claim shall be filed with full particulars *as soon as practicable thereafter.*

3. The time in which this itemized statement must be filed is limited to six months.

Still another provision of said bond is:

> "That no suit or proceeding at law or in equity shall be brought to recover any claim under this bond unless the same shall have been commenced within twelve months (365 days) from the date of the first notification by the Employer to the Company of any loss hereunder."

So it is quite certain that the first notice was to be given immediately, simply to cancel the bond, and was to be of a general nature, not specific, and then the itemized statement was to be furnished as soon *thereafter* as practicable—not later than six months—and suit commenced within twelve months from *first notice.*

On July 2, 1897, an itemized statement was filed by the receiver with plaintiff in error, of these defalcations. This must have been within a few days of the time when the examination by these experts was concluded.

So as far as the receiver is concerned he has complied literally with the terms and conditions of the "bond," both as to the first notice, the filing of the "full and particular account" and in bringing suit within the period of limitation.

It seems that counsel for plaintiff in error in their brief confound the time in which the first notice is to be given, and the time allowed to file itemized account or full and particular statement of loss. In the latter case the condition is to be complied with as soon as practicable after the first notice, but not later than six months thereafter.

It is insisted, however, that R. E. Reutlinger, the Cashier, Adolph Reutlinger, Vice-President, and Jacob Reisch, a Director, all had notice of the $1,000 draft of S. E. Edmunds of January 21, 1896, and the discounting the $2,000 Britt and Reeder note of date February 6, 1896, and that therefore this was notice to the Bank, and it should have immediately given notice thereof to plaintiff in error, and failing to do so said bond was released.

The evidence does not bear out the contention that these parties had any knowledge of the *fraudulent nature* of any of these transactions. The Cashier knew the check was drawn by Edmunds, and also that the Britt and Reeder note was discounted by direction of the President, and, in his presence, and he told his father, Adolph Reutlinger, who was not actively engaged in the Bank, of this just as he told him of all other transactions. Both of these parties say they had no knowledge of the nature of any of these transactions or for what the money was paid out, and there is no evidence in the case tending to show they had any such knowledge.

Jacob Reisch says that Adolph Reutlinger told him about the $2,000 Britt and Reeder note, and in an indefinite kind

of a way undertakes to say that he told him at some time that it was used in the *Todd race*, but it can plainly be seen from his examination—first saying that he *did not* and then stating he *did* tell him—that he is in doubt, and is confusing dates. Adolph Reutlinger says he did not know the nature of the transaction and did not tell Reisch as he states. Adolph Reutlinger says he could not learn whether this Britt and Reeder note was good or not, and did call it up before the Board at its meeting, but that McKnight, the President, stated that it was perfectly solvent and good, *that he knew it was*, and he would also undertake himself to see to it—he was the chief officer of the Bank. He had the right to discount paper. There were no grounds on which to suspect him, and even if a vague suspicion did rest in the minds of any of the Board, that was not sufficient to make notice to the plaintiff in error necessary; the case of American Surety Co. vs. Pauley, 170 U. S., 131, and American Surety Co. vs. Pauley, 170 U. S., 159, is believed to sustain the contention on these propositions.

But conceding that these parties received the information it is claimed, it is earnestly contended for the defendant in error that this was not such notice to the Bank as would require action:

1. Because the information or knowledge which it is charged that the Reutlingers and Reisch had is not such information or knowledge as under the terms of the bond became necessary to give notice, as the first section of the bond only required notice to be given upon the discovery of any *default or loss*.

The third section of the bond, where it speaks of the employer "condoning any act or default on the part of the employee which would give the employer the right to claim under said bond, and shall continue the employee in its service without written notification to the company," must necessarily refer to such *default or loss* referred to in the first

section, and can not relate to mere *irregularities* or *mistaken judgment*, and as McKnight, as President, had the right in all cases to discount paper and thereby become the sole judge as to the surety, terms, etc., and as in the matters mentioned he appeared before the said Board and assured them of the solvency of the parties, and assumed the responsibility even himself for the payment of said note, and as the opening of the Bank at night had been done in many instances in order to accommodate customers, while that was a little out of the order of things, it was not such information or knowledge as to authorize the officers of the Bank to give notice thereof; such notice is nothing short of charging a crime against the President, and certainly the information did not justify any such charge.

2. Because notice to those parties, as individuals, and not while acting officially for the Bank, will not be imputed to it.

3. It is not claimed that any notice was given to the Directors as a body, except as to the $2,000 Britt and Reeder note, and even as to this note *Reisch does not pretend that he told the Board for what the money was given.*

The Reutlingers only knew that the Edmunds check had been drawn; Edmunds was a partner of McKnight, and had an account and was doing business with the Bank. McKnight as President had the right to order said check paid, and there was nothing unusual in the transaction. The Cashier knew of some of the other checks cashed by order of McKnight, but the same is true as to these.

As to the Britt and Reeder note the Bank was kept open by request of McKnight beyond the usual hour—and the evidence shows this frequently occurred. The note, on its face, did not bear interest to maturity, but this is frequently the case with such paper, discount being deducted or interest added in the note; and when the attention of the Directors was called to this note, there appeared no indication of any embezzlement of the Bank's money, but on the contrary the President, who had the right to discount paper, assured them that

it was all right, and he seems to have satisfied the Board—he was their chief officer—they had never suspicioned him of any wrong-doing. The notice to them was not sufficient to make the most cautious suspect anything wrong, even irregular.

The question of this notice will be again considered under the other errors assigned.

It is further contended for plaintiff in error that the charge given by the Court as to this notice, and which is designated as No. 2 in the bill of exceptions, and is as follows:

> "In considering that clause of the contract between these parties, I do not think the word 'immediate' should be given such construction as that it would mean instantly, but I believe that it conforms with the views of the Supreme Court and the authorities generally to tell you that it means that it was the duty of the plaintiff in this case to give, as soon as reasonably practicable and with promptness, notice of the discovery of any default. It did not mean that as soon as one was suspected that notice should be given, but if you believe from the evidence that, within a reasonable time after, the receiver in this case—and you must remember that he is the receiver merely, and that he knew nothing about the management of this Bank, nothing of its affairs, until he was appointed—if you believe that within a reasonable time after he discovered, actually discovered, a default he gave the notice of the 18th day of February, 1897, you are at liberty to infer that the part of the obligation of this bond has been performed"—

Is erroneous, because it excludes from the consideration of the jury the Edmunds and Britt and Reeder transactions. Only such parts of the charge as are excepted to are copied in the record, and this part of the charge here referred to related only to these particular matters of Reutlinger and Reisch. Charge No. 5, copied in said bill, relates to the Britt and Reeder and other similar transactions and cures this seeming error. It is as follows:

> "Now I suppose in this case if the Bank had known that McKnight was making these drafts for these various

fraudulent purposes, such as buying up councilmen, buying up aldermen, paying his own private personal debts—if the Bank had known that and consented to it, there would not have been a fraudulent act by McKnight for which the Bank could recover against this Company, but if you believe from the evidence that the Bank did not know of the fraudulent purposes, then that changes the result."

II.

"Petition in Courtney vs. McKnight was competent evidence."

This petition does not show upon its face the nature of the indebtedness sued for therein or that it had any connection whatever with or was a part of any of these defalcations. The Court, it is to be supposed from date and amount, did assume that the item of $3,736 was one of these amounts embezzled. So it could not be competent unless something more was shown outside of the petition.

This petition was filed on March 6, 1897, in the Jefferson Circuit Court; this was some twenty days after the *first notice*, that is, of February 18, 1897, had been given. So it will not be contended that it illustrates anything whatever as to this notice or that it was competent evidence bearing in any sense upon this notice.

The only purpose the introduction of this suit could serve was to show that the receiver had notice of any defalcations therein included, on March 6, 1896—some three months before the *claim against the Company with full particulars thereof was filed.* If this suit shows anything it is that the receiver did not then know the full particulars of his claim against the Company under this bond. He was not required to make out his claim item by item as it was discovered, but was to make out the whole claim, with full particulars, as soon as practicable, not later than six months after first notice which cancelled the bond.

Giving the full force to this that is claimed by plaintiff in error, it would simply show that the receiver had then discovered three items and no more. The examination of the experts had not been completed—and certainly the six months' time limit in which a full and particular claim must be filed had not expired.

The statements of the petition could have been admitted as true and as showing all facts claimed, yet it would not have prevented a recovery, as such evidence under the facts of this case was not material.

Plaintiff in error was not prejudiced by the exclusion of this evidence.

IV.

Cashier's Letter of May 15th Bound the Bank.

It is contended that the refusal of the Court to admit this letter was an error and prejudicial to the rights of plaintiff in error.

This letter was written to the Company by the Cashier of the German National Bank and is in response to one written by said Company to the said Bank, and the order and proceedings in reference thereto are as follows, to-wit:

> "And thereupon the defendant offered in evidence a letter signed by R. E. Reutlinger, Cashier, and addressed to the defendant, the Fidelity & Deposit Company of Maryland, as follows:

Security Department. No. 5002. Bond Division.

FIDELITY & DEPOSIT COMPANY OF MARYLAND,
Home Office, Baltimore, Maryland.

BALTIMORE, May 15, 1896.

To German National Bank, Louisville, Ky.:

DEAR SIR—We hereby notify you that Bond No. 5002, for $10,000, issued by this Company on behalf of Jacob M. McKnight, in your employ as President, will expire on the first day of June next.

The premium, $40, should be paid on or before the date of expiration, otherwise the bond will lapse. Kindly have the certificate below filled in and signed and forward, with remittance for premium, to Jos. S. Odiorne, General Agent, when the renewal receipt will be sent you.

Yours respectfully,
EDWIN WARFIELD,
President.

To Fidelity & Deposit Company of Maryland:

This is to certify, That on the day of 189 , the books and accounts of Mr. J. M. McKnight, is President, in our employ, as has no books and accounts were examined by us, and we found them correct in every respect and all moneys handled by him accounted for.

He has performed his duties in an acceptable and satisfactory manner, and we know of no reason why the guarantee bond should not be continued.

His salary is now $4,500, and he is employed as President.

(Signature) R. E. REUTLINGER, *Cashier*,
Employer.

Dated at Louisville, Ky., May 29, 1896.

To Employer—Notice of Expiration:

"And it not appearing that there had been special authority from the Board of Directors of the said Bank, authorizing or directing the said Cashier to write such communication, and the Court being of opinion that the Cashier had no such power by reason of his office, the same was not binding upon the said Bank, and excluded the same as evidence, to which the defendant excepted at the time, and still excepts. After the Court had refused the defendant permission to read to the jury the letter signed by the Cashier and addressed by him to the defendant, and dated May 29, 1896, and relative to the renewal of the said McKnight's bond, the counsel for the defendant asked the said Cashier the following questions:"

No attempt was made to show that any other officer of said Bank had any knowledge of the writing or sending of said letter.

In American Surety Company against Pauley No. 1, 170 U. S., 160 (986), the same defense was made as herein, except the President of the Bank wrote the letter to obtain bond for Cashier; in all other respects the facts are almost identical—and after reviewing a number of cases the Court says:

"Without stopping to consider whether each of the above cases was correctly decided, it may be observed that those relating to sureties in bonds given to corporations arose directly between the sureties and corporations represented by their Boards of Directors or by some of their officers acting within the authority conferred upon them; and those relating to the liability of a principal by reason of the acts or representations of his agent arose out of the agent's acts or declarations in the course of the business intrusted to him.

"None of the cases cited embrace the present one. In the first place, the procuring of a bond for O'Brien, in order that he might become qualified to act as Cashier, was no part of the business of the Bank, nor within the scope of any duty imposed upon Collins as President of the Bank. It was the business of O'Brien to obtain and present an acceptable bond. And it was for the Bank, by its constituted authorities, to accept or reject the bond so presented. The Bank did not authorize Collins to give, nor was it aware that he gave, nor was he entitled by virtue of his office as President to sign any certificate as to the efficiency, fidelity or integrity of O'Brien. No relations existed between the Bank and the Surety Company until O'Brien presented to the former the bond in suit. What therefore Collins assumed in his capacity as President to certify as to O'Brien's fidelity or integrity, was not in the course of the business of the Bank nor within any authority he possessed. He could not create such authority by simply assuming to have it. The Circuit Court of Appeals, speaking by Judge Lacombe, well said that there were many acts which the President of a Bank may do without express authority of the Board of Directors, in some cases because the usage of the particular Bank impliedly authorized them, in other

cases because such acts were fairly within the ordinary routine of his business as President, but that the making of a statement as to the honesty and fidelity of an employe for the benefit of the employe, and to enable the latter to obtain a bond insuring his fidelity was no part of the ordinary routine business of a Bank president, and there was nothing to show that by any usage of this particular Bank such function was committed to its President.

"It must therefore be taken, as between the Bank and the Company, that the former can not be deemed, merely by reason of Collins' relation to it, to have had constructive notice that he, as President, gave the certificate in question.

"The presumption that the agent informed his principal of that which his duty and the interests of his principal required him to communicate does not arise where the agent acts or makes declarations not in execution of any duty that he owes to the principal, nor within any authority possessed by him, but to subserve simply his own personal ends or to communicate some fraud against the principal. In such cases the principal is not bound by the acts or declarations of the agent unless it be proved that he had at the time actual notice of them, or having received notice of them, failed to disavow what was assumed to be said and done in his behalf."

A great number of authorities are cited to show that the Cashier is the agent of the Bank for the purpose of writing and receiving letters, and that an action of deceit may be maintained against a bank for the fraudulent representations of its Cashier, but in all of these text-books quoted and cases cited a condition precedent is always stated; that is, *when the Cashier acts within the scope of his authority*—and as said in the American Surety Company vs. Pauley, above quoted:

"In the first place, a procuring of a bond for O'Brien, in order that he might become qualified to act as Cashier, was no part of the business of the Bank, nor within the scope of any duty imposed upon Collins as President of the Bank."

Again:

> "No relation existed between the bank and the Surety Company until O'Brien presented to the former the bond in suit; what therefore Collins assumed in his capacity as President to certify as to O'Brien's fidelity or integrity, was not in the course of the business of the bank, nor within any authority he possessed."

If the Cashier acts as agent, such acts must be within the scope of his authority in the discharge of the *business of the bank*, and, as it was not the business of the Bank to procure McKnight's bond, the Cashier could not bind the Bank by his acts unless authorized specially or by usage, or unless the acts have been ratified.

No authority or usage is attempted to be shown; it is contended, however, that this act was ratified by the Bank continuing the bond from June 1, 1896, to June 1, 1897.

The original bond was issued June 1, 1894, and it had been once renewed before this letter was written, which bears date May 29, 1896; the last renewal was made June 1, 1896. It is not pretended that the Bank or any of its officers —except the Cashier—ever knew that this letter was written —the continuance of the bond did not ratify that act, as the existence of the bond gave no notice of such a letter.

It is stated that the guarantee was gotten by the Bank from the Company, and that this could have been shown had the Court permitted the examination to proceed.

There is no evidence tending to show that the Bank had anything whatever to do in procuring this bond, and, as to the Court preventing the examination on said point, attention is called to the Record, page 54, where the entire examination is found, and, being brief, same is given here, to-wit:

"I would like to ask the witness this question: Did not the Bank pay for the bond of the President?"

A. "I could not answer that; I don't know it."

Q. "Did not the Bank pay for your bond as Cashier?"

A. "I think they did; yes, sir."

Q. "Were not all these bond matters discussed by the Board of Directors and the party that was to give bond, and was not the party that was to give bond selected by the Board of Directors?"

Objected to by counsel for plaintiff; objection sustained, to which the defendant excepted. Then counsel for the defendant asked the witness this question:

"Did you not know why you were signing any paper of this sort at all?"

A. "Yes, sir; I knew when that letter came; I knew it, yes, sir; not before that, though."

Q. "You knew the bond had to be renewed, then, and you wrote the letter to the Company on that account?"

A. "I signed that paper; yes, sir."

Objected to by counsel for plaintiff, because the paper had been excluded, and is immaterial.

By the Court: "Yes, that is an improper question;" to which ruling of the Court the defendant excepted.

It is respectfully submitted that this investigation and the ruling of the Court thereon did not prejudice the rights of plaintiff in error.

V.

The Cashier's knowledge of McKnight's default was the knowledge of the Bank.

VI.

Knowledge of Directors Reutlinger and Reisch was Knowledge of the Bank.

As to these propositions contended for by plaintiff in error it is submitted that in speaking of the alleged fraudulent transaction between McKnight and Reeder and Britt respecting the $2,000 note, and which was one of the earliest, if not the earliest, in point of time of all those alleged, the Court charged the jury (Rec., p. 51), that if they believed from the evidence that this transaction and its fraudulent purpose was known to and condoned by the Bank before the other transactions occurred, then the defendant was not liable. But the Court, in stating the converse of the proposition, charged the jury that if they believed that the Bank did not know it, that it was the fraudulent act of McKnight alone, not participated in by the Bank, and the defendant was not liable, explaining in parenthesis that when the Court said Bank he meant Bank, and did not mean an individual director merely.

It is insisted that the Court should have charged that the knowledge of Adolph Reutlinger, the Vice-President, and a director, should be imputed to the Bank, or else that of Reisch, to whom it was communicated, should be. What little knowledge they had is stated on page 46 of the record, and by no means shows that either of them knew of any fraudulent intention on McKnight's part—the only knowledge that was important in this connection, as clearly appears from the charge. Mere knowledge that the President had made a discount at an unusual hour was nothing to excite suspicion, and when all either Reutlinger or Reisch knew was laid before the directors, McKnight's explanation was accepted as natural and satisfactory. His real fraudulent political purpose was never made known.

Reutlinger being Vice-President added nothing to the fact of his being a director, as he was not a manager of the Bank. This part of the charge was, of course, specially limited to and based upon the facts proved concerning the knowledge of Adolph Reutlinger, who had mentioned to director Reisch the facts which had been told to him. This common knowledge, however, was limited to the fact that the Reeder and Britt note had been discounted at an unusual hour, and in no way embraced any knowledge of the fraudulent purposes of the President of the Bank.

On page 37 of the record it is shown that this knowledge on the subject of what had occurred sometime before was communicated to Reutlinger at his home at night after business hours by his son. He told Reisch of it. The Reeder and Britt transaction was with the President, the chief executive and head of the Bank, and not with the Vice-President or either of the directors. It might have been unusual, but it was within the power of McKnight, the President, and was therefore nothing to excite suspicion. The information certainly did not come to Adolph Reutlinger at his office, nor anywhere in the bank, nor while he was at his place of business, and knowledge coming this way to a single director of a transaction within the President's powers is clearly not the knowledge of the Bank, and particularly not its knowledge of anything wrong of which the director had really no knowledge. The same observations apply to whatever knowledge Reisch had. The authorities leave no doubt that, upon the facts of this case, the Court below was entirely correct in this part of the charge. It is only necessary to refer the Court to the latest edition of Cook on Corporations, Vol. 2, Sec 727. And it can not be too strongly emphasized that all this information of these two directors was promptly laid before the full board, and by it approved, but as McKnight concealed his real purpose when making his explanation, the Bank knew nothing of it, and the defendant

was in no way prejudiced by this part of the charge, even if it had been technically incorrect.

In second volume of Cook on Corporations, 4th edition, Section 727, page 1564, it is said:

> "In general the test turns on whether the corporation agent received the knowledge in the regular course of business. Knowledge by an officer, derived as an individual and not while acting officially for the corporation, can not operate to its prejudice, and will not be imputed to it."

In the case of C. N. Bank vs. Clark *et al.*, 139 New York Reports, pages 312, 313 and 314, it is said:

> "In order to obviate the effect of the rule we have discussed, the appellants proved that Winslow, a director of the payee company, was also a director in the plaintiff bank at the time when the note was discounted, and it was argued that the knowledge chargeable to him as director of the former company was imputable to the plaintiff. But that fact is insufficient to charge the plaintiff with knowledge of the character of the obligation. He in no sense represented or acted for the bank in the transaction, and whatever his knowledge respecting the note it will not be imputable to the bank. (National Bank vs. Norton, 1 Hill, 572, 578; Mayor, etc., vs. Tenth National Bank, 111 N. Y., 446, 457; Farmers, etc., Bank vs. Payne, 25 Conn., 444.) He was but one of the plaintiff's directors who could only act as a board. (National Bank vs. Norton, *supra.*) If he knew the fact that these were not individual but corporate notes, we can not presume that he communicated that knowledge to the board. An officer's knowledge, derived as an individual and not while acting officially for the bank, can not operate to the prejudice of the latter. (Bank of U. S. vs. Davis, 2 Hill, 451.) The knowledge with which the bank, as his principal, would be deemed chargeable so as to effect it would be where as one of the Board of Directors and participating in the discount of the paper, he had acted affirmatively or fraudulently with respect to it; as in the case of Bank

vs. Davis (*supra*), by a fraudulent perversion of the bills from the object for which drawn; or as in Holden vs. New York & Erie Bank (72 N. Y., 286), where the President of the bank, who represented it in all the transactions, was engaged in a fraudulent scheme of conversion. It was said in the latter case that the knowledge of the President, as an individual or as an executor, was not imputable to the bank merely because he was the President, but because, when it acted through him as President in any transaction where the knowledge was material and applicable, it acted through an agent.

"The rule may be stated, generally, to be that where a director or an officer has knowledge of material facts respecting a proposed transaction which his relations to it as representing the bank have given him, then, as it becomes his official duty to communicate that knowledge to the bank, he will be presumed to have done so, and his knowledge will then be imputed to the bank. But no such duty can be deemed to have existed in this case, where the appellants have made and delivered a promissory note, purporting to be their individual promise. If one of the plaintiff's officers did have knowledge, whether individually or as a director of the Clark & Chaplin Company is not material, that the paper was made and intended as a corporate note, his failure to so state to the bank could not prejudice it. It was in no sense incumbent upon him, assuming that he actually participated in the discount (a fact not shown), to explain that the note was the obligation of the Ridgewood Company and not of the persons who appeared as its makers. He was under no duty to these persons to explain their acts, and the law would not imply any. At most, it would be merely a case of knowledge, acquired by a director, of facts not material to the transaction of discount by the plaintiff, and which he was under no obligation to communicate."

In American Surety Co. vs. Pauley, 170 U. S., 153 (985), it is said:

"Without stopping to consider whether each of the above cases was correctly decided, it may be observed

that those relating to sureties in bonds given to corporations arose directly between the sureties and corporations represented by their boards of directors or by some of their officers acting within the authority conferred upon them; and that those relating to the liability of a principal by reason of the acts or representations of his agent arose out of the agent's acts or declarations in the course of the business intrusted to him."

Neither Adolph Reutlinger nor Reisch received any information while acting for the Bank or in the regular course of business, and consequently what they did learn was no notice to the Bank.

On the trial of this case, plaintiff in error did not introduce any evidence, and there was no conflict whatever in the evidence heard as to the manner and circumstances under which Reisch and Reutlinger received their information. Then, as it is clearly shown that they received their information as individuals, and not while acting for the Bank, as a matter of law it was no notice to the Bank, but in any event their information if so received as to be imputed to the Bank, still it was not sufficient or of such a nature as to give the Bank or its officers notice of any fraudulent act of McKnight as against the Bank or which in any way come under the provisions of bond of guarantee of fidelity.

Both these parties knew the Britt and Reeder note had been discounted by McKnight, the President of the Bank—they knew it had been done at an unusual hour, but the Bank had been kept open late on other occasions. Reutlinger says he did not know for which purpose the money was used. Reisch thinks he did tell him it was to be used in the Todd race—Mayor's race. Reisch is evidently mistaken, but take it that they knew the money was to be used in said race—if the note was good, this could not affect the Bank, or if the note was not good; yet McKnight had the right to discount paper for the Bank, and if he believed it good or *if he convinced the Board of Directors that he acted in good faith*,

then although the parties to said note may have been insolvent and this fact known at the time to McKnight, still he was acting in his own interest—fraudulently—these facts shown are not sufficient to put the Bank on notice of such fraud.

On page 37 of the record it is stated:

"As to the $2,000 Britt and Reeder note, there was also evidence tending to show that R. E. Reutlinger was required to stay at the Bank until after banking hours, and was directed by McKnight to, and did lay out the $2,000 on said note to said parties, but that further than this he had no knowledge thereof.

"There was also evidence tending further to show that said R. E. Reutlinger informed his father, Adolph Reutlinger, Vice-President, of the payment of this $2,000 that night, and that said Adolph Reutlinger made inquiry of McKnight to explain the transaction. That thereupon McKnight told him that said parties were good and solvent, and the note was regularly discounted and all right, and that if required Gaulbert or Whallen would sign same with them, and that he, McKnight, would guarantee the payment thereof; that the parties were obliged to have the money that night, and he so kept the Bank open to let them have it.

"There was evidence tending further to show that said Adolph Reutlinger then went before the directory and told them what McKnight had said in regard to this note, and said to them that he had made some investigation and could not find that these parties had any property; that he was unable to say whether or not they were good; and that thereupon McKnight came before said directory and made the same statement to them that he had made to Adolph Reutlinger, assuring them that the note was good, and that said directors believed and relied on his statement, and so passed the note; that there was no other evidence tending to show any further knowledge of said note, or its true character, by the other officers or any of the directors of the Bank other than as herein stated, except in the testimony of

Jacob Reisch, one of the directors, that some short time after the execution of said note Adolph Reutlinger told him what he had learned thereof as herein stated, and further he says that said Reutlinger told him then that the money was used in the Mayor's race. This latter statement Adolph Reutlinger denied in his evidence."

Thus it is shown that, McKnight having the authority, as President, to discount this note, and being questioned as to the solvency of the parties, etc., convinced the board by his statement—which they had the right to rely on—that the transaction was all right and the note perfectly good.

In the case of the United States against Britton, 108 U. S., 199 (702), it is said:

"One branch of the business of a banking association is the discounting and negotiation of promissory notes, and this is to be done by its Board of Directors or duly authorized officers or agents. (Sec. 5136, Revised Statutes.) There is no provision of the Statute which forbids the discounting of a note not well secured, or both the maker and indorser of which are insolvent. It is within the discretion of the directors or the officers or agents lawfully appointed by them to discount such a note if they see fit, and it might under certain circumstances, tend to the advantage of the association. This count does not charge that the note of the defendant was discounted at his instance, without the authority of the Board of Directors. On the contrary, the charge is that he caused and procured it to be discounted. This implies that it was done by the directors or other duly authorized officers or agents. It is not alleged that the discount was procured by any fraudulent means. From all that appears the Board of Directors, or the officer or agent by whom the note was discounted, may upon knowledge of all the facts in the utmost good faith and for the advantage of the association, have decided to discount the note. The discount may have turned out to be a benefit to the association, for there is no averment that the note was not paid at maturity or that the association suffered any loss by reason of its discount."

What is herein said in reference to the knowledge of Reisch and Reutlinger, is equally applicable to that of R. E. Reutlinger, the Cashier, except perhaps the Cashier may have received some of his information while acting officially for the Bank, but he received it from the chief officer, the President, and it was all in regard to acts and duties that that officer had a right to and was performing, and consequently gave no notice of any fraud to the Cashier.

Reutlinger, the Cashier, did know of these various checks given by McKnight, and that by his instructions they were held for awhile and then charged up to either "The Louisville Deposit Bank Collateral Account," "The E. G. Williams, Special," or "The S. E. Edmunds & Co. Account," as McKnight directed; he also knew that "The Louisville Deposit Bank Account," and "The E. G. Williams, Special," represented the collaterals amounting to some $200,000 of the Louisville Deposit Bank held by the German National Bank, and being managed, collected and disposed of by McKnight as President, and that he gave many checks chargeable to said account, and the Cashier did not know or have any means of knowing for what they were given. Said Cashier also knew the S. E. Edmunds & Co. Account was the account of the tobacco firm composed of Edmunds and McKnight; that they bought and sold a great deal of tobacco—gave many checks and made many deposits. He also knew McKnight, as President, was receiving from said Bank a salary of $4,500 per annum. He knew that the $1,000 check of Edmunds was drawn in the usual course of business and ordered paid by the President—and that the Britt and Reeder note was regularly discounted by order of the President. He had no knowledge of any fraud in any of these transactions, and neither the facts of such transaction nor any attending circumstances gave him such notice or even caused him to suspicion anything wrong. McKnight explained to him why it was he wanted the Bank left open beyond usual hours, and this has been done on other occasions to attend to business matters.

So if it be contended that notice to a cashier while in the discharge of official duties of the bank is notice to the bank —still if all of this information and knowledge charged to this Cashier had been imparted to the Bank, it would not have given the Bank notice of any fraud upon the part of McKnight, nor would it have been such knowledge or information as under the conditions of the "bond" the defendant in error was required to give the Guarantee Company notice of.

In that part of the charge excepted to, marked Instruction No. 6, found on the 60th page of the record, the Court said:

> "I do not think that the knowledge of a cashier of a bank, speaking generally, is the knowledge of the bank as to any matter that does not come within the customary or ordinary duties of a cashier or those which have been specially imposed upon him by the action of the bank. I do not think Mr. R. E. Reutlinger in this case, in respect to any matter which he knew or could do, represented the Bank, if it was outside of his ordinary duties; and I do not recall anything that he knew, so far as the proof shows, that would in anywise affect the liability of the defendant in this case."

It is believed that the law is correctly given in this case, but if it be that it is too broadly stated when speaking generally as to the knowledge of the Cashier being the knowledge of the Bank, under the facts proven in this case at bar, plaintiff in error has not been prejudiced by this technical error. The Court correctly says that the Cashier does not state anything *in this case* that would in anywise *affect the liability of defendant.*

It is not deemed necessary—considering the position held by McKnight, his authority, the salary paid him, and the entire failure of the proof in this case to show any fraudulent intent on his part in overdrawing his account—to discuss the

proposition as to whether or not the simple fact of such overdraft evinced such fraud as to make it the duty of the Bank to notify the Guarantee Company.

In that part of the charge No. 7, in the record, page 61, it is said:

> "The testimony in respect to the knowledge of the Bank of the purpose for which the $2,000 was taken out at half-past six or seven in the evening, I say the knowledge of the Bank respecting that must be proven, in my judgment, in such a way as to satisfy the jury that the Bank, as distinguished from any mere director of it, knew of that transaction. The elder Reutlinger tells you that he did not know the purpose for which that money was taken out of the bank. He knew it was taken out after the ordinary banking hours, being taken out at seven or half-past seven o'clock. The bank sometimes for special reasons he named had been kept open. Now, there is no inference to be drawn against R. E. Reutlinger because he at the instance of the president kept open the bank for the purpose of, as he said, introducing certain friends at a late hour. *If Mr. R. E. Reutlinger had known of the fraudulent purpose of McKnight, or had participated in it, that might have been a different thing; but he says he did not.* He did not know what this money was paid out for. On the demands of the President he paid the money, on the discount arranged by the President, and that is all he knew about it. The only conflict of evidence in the case is that Mr. Reisch says that within a short time, a day or two afterwards, he was informed by the elder Reutlinger that this money was used for this political or corrupt purpose. It is for you to reconcile this statement. If you believe from the evidence that the Bank did know of this fraudulent purpose, and that this default of McKnight's, this fraudulent act of McKnights in getting this $2,000, was known to the Bank at the time, then I instruct you that all of the liability of the defendant in this case would cease then, that being the earliest, or one of the earliest, if not the earliest of all these transactions. If you believe from the evidence that this transaction

was known and condoned by the Bank at the time, before these other transactions occurred, then the defendant in this case is not liable. But if you believe on the contrary that the Bank did not know it, that it was the fraudulent act of McKnight alone, not participated in by the Bank—when I say the Bank I mean the Bank, I do not mean any individual director—then the defendant is liable."

This shows clearly that the Court intended to and did say to the jury that as the Cashier denied *any knowledge of fraud upon the part* of McKnight, and as there was no evidence in the case either from the transactions or the surrounding circumstances tending to show any such knowledge or any evidence from any other witness tending to show that the Cashier had knowledge of any fraudulent act on the part of McKnight, that the knowledge he did have of the transaction was not sufficient in any event to give the Bank such notice of fraud as to require action on its part.

In charge No. 5, record, page 58, it is said:

"What is due or customary supervision is something that has not been made very clear by the evidence in making out this defense. I don't know that it has been made clear to the jury any more than it has to the Court as to what is the customary supervision that is meant, or what is the due supervision that is meant. Possibly it may mean, and may be fairly considered to mean, a reasonable vigilance upon the part of the bank to prevent defaults. Now what is meant by that word default in this connection? I suppose that it may fairly be said that it means that there shall be observed due and customary supervision over the employe for the prevention of fraudulent acts. I suppose it is just to say that this word default means the violation of this contract or the doing of such an act as could be brought fairly within the provisions of this bond. That is to say, the word default here would mean precisely what the previous part of the bond meant when it said fraudulent acts

of McKnight. So that this obligation that the Bank assumed here was to use due and customary supervision over the employe for the prevention of his committing fraudulent acts. Now it is for you to say whether there is no satisfactory proof upon that subject, whether there was due and customary supervision to prevent McKnight from perpetrating these frauds."

As appears by the record, page 62, the following proceedings were had, viz.:

"During its consideration of this case the jury asked further instructions of the Court, and the jury being brought into open Court in the presence of counsel for both sides, the following proceedings were had:

"By the Court: The jury have addressed to the Court, in writing, this inquiry:

"'If the jury agree that the directors of the Bank were careless in the management of the Bank, shall the jury find for the defendant?'

"'Gentlemen of the jury, no such issue as that stated in this question was presented. The mere question of whether or not the directors generally were careless in their management of the Bank is not a question for your consideration, nor would it exempt the defendant from the obligation imposed by the bond sued on. You have already been instructed as to the meaning and effect of the condition of the bond as to due and customary supervision and outside of that there is no provision as to carelessness.'"

As shown by charge No. 5 the proposition as to due and customary supervision for the prevention of fraud had been submitted to the jury fully and completely. Now they ask as to carelessness in the management of the Bank—which is much broader than the conditions of the bond. They are referred to the former instruction—which was specific in its

nature and gave the law governing this particular case, which was all that was proper or necessary.

While the petition alleged that there had been default on the part of McKnight to the amount of eighteen thousand seven hundred and forty-two dollars and seventy-four cents ($18,742.74), made up of eleven items, set forth in detail on the fourth page of this brief; in considering these matters, it must be borne in mind that, as conceded by the attorney for the plaintiff in error in his brief, and as shown by the full instruction given in the case (which is not, however, copied in full, as shown by the record of this case), that of these eleven items the following five were abandoned, viz.:

June 11, 1894, ...	$252.09
April 6, 1895, ...	4,400.00
Sundry items, ...	443.15
November 26, 1896, . .	2,627.94
March 19, 1895, ...	1,000.00

These items were abandoned, because it was conceded by both plaintiff and defendant that upon examination they were found not to be such transactions as come under said bond, or such as could in any wise entitle plaintiff to recover therefor on said bond, and that in addition to this, as to these items, no irregular action or fraudulent purpose was shown on the part of said President, so the inquiry upon the trial of this case and the only matters at issue were as to the following items:

January 21, 1896,	Edmunds note,	$1,000.00
January 21, 1896,	Sachs check,	1,253.00
February 6, 1896,	Britt & Reeder note,	2,000.00
Feb. or March, 1896,	Sachs check,	1,650.00
June 8, 1896,	Union Nat'l Bnk check,	3,736.60
June 4, 1897,	Union Nat'l Bnk check,	379.96

As to these two Sachs checks and the two Union National Bank checks, it is not claimed, either in evidence or by the pleadings, that the Bank or any of its officers had any notice

of any fraud involved in such transactions, except it is claimed that the Cashier held these checks for some short while before charging them up, but the record also shows that these checks were given by McKnight to these parties, and were paid through the Clearing House, and therefore not by the Cashier, and that when the Clearing House slips came in, by instruction of McKnight, they were held for some short while. But the evidence also shows that they were afterward charged to the Williams, special, account, to the Louisville Deposit Collateral account and to the Edmunds & Co. account, all of which accounts were under the special management and charge of McKnight, the first two being accounts for whisky sold and expenses therefor, and the third being a similar account in regard to tobacco; and the fact of holding these matters could in no wise constitute an irregularity or create even a suspicion of anything wrong, as they did not show upon their face for what they were given, and McKnight in the proper handling of this whisky and tobacco was from day to day paying out and receiving hundreds of dollars, and said accounts were kept under his special directions and the amounts charged to same as he directed, and it was thus owing to the size of these accounts, the number of transactions involved therein, they representing in the neighborhood of some two hundred thousand dollars, that McKnight was enabled to conceal his fraud to that extent, that it took even the expert examiners some four or five months to pick out these items.

As to the Edmunds note. He was the party who had charge of this tobacco represented by this Edmunds & Co. account, and was daily drawing drafts and paying in money on said account, and even if the Cashier had known, which he says he did not, that Edmunds intended to use this one thousand dollars in an election fraud, it was not such information as would show a default or loss under the bond.

As to the two thousand dollar Britt and Reeder note, this appeared regularly upon the books as a discounted note, and

21520

the fact that the Bank was open after banking hours in order to permit the money to be withdrawn was nothing unusual with that Bank.

It is therefore respectfully submitted that the evidence in this case does not in any particular sustain the defense herein.

Since the decision in this case, this honorable Court, on the 6th of January, 1902, rendered an opinion in the Guaranty Company of North America, Petitioner, vs. Mechanics Savings Bank & Trust Company, etc., and it is contended that the rulings therein are applicable to the case at bar.

The evidence in this case at bar is not of the nature or strength of that in the Guaranty case; besides the bonds in the two cases are not alike.

SUMMARY.

For defendant in error it is contended:

That the first notice, that is, the notice of defalcation, was required only to be general in its nature, and Instruction No. 2, page 58 of the record, correctly states the law, as applied to the facts of this case.

That the second notice or the full and particular statement of loss is required to be given as soon as praticable—not later than six months from the first notice. That this statement was furnished as soon as the experts' examination was completed and within six months and the law governing same was correctly given in Instruction No. 3.

That the Court properly excluded by Instruction No. 1 the consideration as evidence the suit of Courtney, etc., vs. McKnight in State Court.

That the Court properly excluded as evidence the letter of the Cashier of date May 29, 1896, as he had no authority to write same and the Bank had no notice thereof.

That the knowledge of the acts of McKnight possessed by the Cashier was not notice to the Bank of any fraud on the part of McKnight; neither the acts nor any knowledge the Cashier had thereof showed any fraud. Admitting the knowledge shown by the evidence, it presented no defense to a recovery; besides it was no knowledge in regard to matters over which the Cashier had control, but related to the acts and duties of the President alone in discounting paper and ordering checks paid.

That the knowledge possessed by Reisch and Reutlinger was not sufficient to make out a defense. That they did not receive it in their official capacity but as individuals, and, therefore, first, it is not sufficient if admitted; second, it is not so obtained as to impute notice to the Bank.

That Instruction No. 5 gives the law correctly as to what constituted due and customary supervision to prevent fraud, and it was proper in the Court to refer the jury to same in answer to their inquiry.

Under the evidence in this case it is respectfully submitted that no error has been committed prejudicial to the rights of plaintiff in error.

W. M. SMITH,

Attorney for Defendant in Error.